

Central Indiana Building and Construction Trades Council and K-Mart Corporation. Case 25-CC-521

July 22, 1981

DECISION AND ORDER

Upon an unfair labor practice charge filed on August 11, 1980, by the K-Mart Corporation, herein called K-Mart, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued on January 19, 1981, a complaint against Central Indiana Building and Construction Trades Council, herein called Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding. Thereafter, Respondent filed an answer to the complaint, admitting in part and denying in part, the allegations in the complaint.

Subsequently, on January 27, 1981, Respondent filed a Motion for Summary Judgment, and on February 12, 1981, the General Counsel filed a Motion for Summary Judgment. On February 17, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why Respondent's and/or the General Counsel's motions should or should not be granted.

Subsequently, on March 2, 1981, the General Counsel filed a response to the Notice To Show Cause, and on March 3, 1981, Respondent filed a supplementary brief in response to the Notice To Show Cause.

Upon the entire record in the case, the Board makes the following findings:

I. JURISDICTION

The complaint alleges, the answer admits, and we find the following:

1. K-Mart, a Michigan corporation, with its principal office and place of business at Troy, Michigan, and various other facilities in the several States including a facility at 3860 High School Road, Indianapolis, Indiana, and other facilities in the Indianapolis area, is, and has been at all times material herein, engaged at said facilities and locations in the business of the retail sale of general merchandise and related products. During the last 12 months, a representative period, in the course and conduct of its business operations, K-Mart derived gross revenues in excess of \$500,000.

During the last 12 months, a representative period, K-Mart, in the course and conduct of its

business operations described above, purchased and received at its High School Road facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Indiana.

2. Waldorf Associates, herein called Waldorf, an Indiana corporation with its principal office and place of business at Indianapolis, Indiana, is engaged in the business of the development, sale, and leasing of commercial properties, and in the business of general construction in the State of Indiana. During the last 12 months, a representative period, in the course and conduct of its business operations, Waldorf purchased, transferred, and received at its jobsites, including the jobsite described below, goods and materials valued in excess of \$50,000, which were transported to said jobsite directly from States other than the State of Indiana. During the same period, Waldorf, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 from the sale or lease of commercial properties.

3. Robert Ellis Frash, an individual proprietor doing business under the trade name and style of Frash Earth Work, herein called Frash, with its principal office and place of business at Noblesville, Indiana, is, and has been at all times material herein, engaged in the business of the excavation and installation of sewer lines, in the grading of land, and in other preparation of construction sites. During the past 12 months, a representative period, Frash, in the course and conduct of its business operations, purchased, transferred, and delivered to its jobsites within the State of Indiana goods and materials in excess of \$50,000 which were transported to said jobsites directly from States other than the State of Indiana.

4. K-Mart, Waldorf, and Frash each are now, and have been at all times material herein, employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and employers engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Central Indiana Building and Construction Trades Council is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

The issue presented is whether Respondent's handbilling, requesting that consumers not shop at K-Mart stores, violated Section 8(b)(4)(ii)(B) of the Act because the handbills were untruthful.

IV. RULING ON THE MOTIONS FOR SUMMARY JUDGMENT

The facts in this case, as established by Respondent's admissions to certain allegations in the complaint, are not in dispute, and there is no matter in issue that requires a hearing before an administrative law judge. For the reasons set out below, we conclude that Respondent's activity is protected under the second proviso of Section 8(b)(4) of the Act, and therefore lawful. Accordingly, we grant Respondent's Motion for Summary Judgment and dismissal of the complaint in its entirety, and we deny the General Counsel's Motion for Summary Judgment.

V. FACTS

On or about April 14, 1980, Waldorf entered into a contract with K-Mart to perform construction of a new K-Mart store at a jobsite located at Thompson Road and Emerson Avenue in Indianapolis, Indiana. Waldorf further agreed that, upon completion of the store, Waldorf would lease it back to K-Mart.

On or about May 1, 1980, Waldorf entered into a contract with Frash for the excavation and other construction work at the Thompson Road/Emerson Avenue jobsite, and on May 26, 1980, Frash commenced performance of said contract.

At all times material herein, Respondent has had a labor dispute with Frash.¹ Commencing on or about July 21, 1980, and continuing until an unknown date in November 1980, in furtherance of its labor dispute with Frash, Respondent distributed handbills at the K-Mart facilities in the Indianapolis area. The handbills stated as follows:

K-MART SUCKS² INDIANAPOLIS ECONOMY DRY

This is a time when Indianapolis needs *support* for its economy, not tearing down. It is a time when a great effort will be required to *maintain* the living standards of our people, rather than bringing on starvation wages.

K-MART is building a new store in Indianapolis. *That's Good!*

K-MART is a huge corporation headquartered near Detroit, Michigan. It doesn't care anything about putting money into Indianapolis, in

¹ Respondent does not contend that at any time material herein it had a labor dispute with either K-Mart or Waldorf.

² In another version of the handbill, the word "Drains" is substituted for the word "Sucks" in the first line of the handbill. In all other respects, the handbills are identical.

the form of decent wages that can be spent at local businesses. It is sucking with all of its might on this city, to pull out every dollar it can—for the Detroit fatcats who run this Company. *That's Bad!*

Right now, it looks like K-Mart is going to build it's [sic] new Indianapolis store with non-union construction companies.* *That's Real Bad!*

DON'T SHOP K-MART *FRASH EARTH WORK CENTRAL INDIANA BUILDING & CONSTRUCTION TRADES COUNCIL

The complaint does not allege, nor does any party maintain, that the handbilling was conducted in a disorderly manner, or accompanied by any picketing. Neither does the complaint allege, nor does any party contend, that the above-described handbilling had the effect of inducing any individual employed by any person to refuse in the course of his employment, to pick up, deliver, or transport any goods, or to perform any services.

VI. CONTENTIONS OF THE GENERAL COUNSEL AND OF RESPONDENT

The complaint alleges in substance that the above-described handbills distributed by Respondent at K-Mart stores in Indianapolis, in furtherance of Respondent's labor dispute with Frash, were not truthful and therefore not protected by the second proviso of Section 8(b)(4) of the Act.

In support of this allegation the General Counsel contends that, while the handbills identify Frash as a nonunion contractor, "the messages of the handbills imply that K-Mart itself was constructing the new store and was therefore directly responsible for the selection of the non-union contractor." The General Counsel emphasizes in this regard that neither Waldorf itself nor the existence of any general contractor is mentioned in the handbill. The General Counsel asserts that the absence of such mention, coupled with the statements in the handbill that:

K-Mart is building a new store in Indianapolis

....

It looks like K-Mart is going to build it's [sic] new Indianapolis Store with non-union construction companies.*

*Frash Earth Works

creates the false impression that K-Mart hired the nonunion contractor, and that Respondent's pri-

mary dispute is with K-Mart. The General Counsel argues that the "mere identification" of the primary employer, Frash, in the handbill as the nonunion contractor does not cure the handbill's "misidentification of K-Mart" as the party responsible for the use of a nonunion contractor. The General Counsel concludes by contending that "[w]hile the Respondent achieved technical accuracy by naming the primary, the handbills remained substantively inaccurate through the misleading context and the omission of any reference to the general contractor."

In its Motion for Summary Judgment, Respondent contends that the truthfulness of the statement "K-Mart is building a new store in Indianapolis" is borne out by the pleadings themselves, in which Respondent admits the complaint's factual allegation that the K-Mart store in question was being constructed pursuant to a contract between K-Mart and the general contractor, Waldorf, with the additional agreement that K-Mart would lease the store from Waldorf upon completion. Respondent further asserts that the accuracy of the statement "K-Mart is going to build its new Indianapolis store with non-union construction companies" (*Frash Earth Works) is also borne out by the pleadings, in which Respondent admits the complaint's factual allegations that K-Mart engaged Waldorf to build the store in question, and that Waldorf engaged Frash to be the excavation subcontractor on the project. There is no dispute about the status of Frash as a nonunion employer.

With respect to the absence of any mention of Waldorf, secondary employer-general contractor on the construction project, Respondent argues that "the legality of handbilling should [not] be made to depend upon whether the union has succeeded in precisely describing the organizational flow chart applying to a given construction project." What is more important, argues Respondent, is that the public be made aware of "the economic reality of the situation," which in this case, in Respondent's view, is simply that K-Mart is building a store and one of the construction contractors on the job uses nonunion labor, causing a dispute between the contractor and Respondent—all of which, Respondent contends, is accurately set out in the handbill.

VII. DISCUSSION OF LAW AND CONCLUSIONS

Section 8(b)(4)(ii)(B), which makes it an unfair labor practice for a labor organization to threaten, coerce, or restrain any person where an object thereof is to force or require any person to cease doing business with any other person, exempts from its proscription:

... publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution

The proviso is inapplicable if a consumer boycott results in refusals by employees, other than those of the primary employer, to pick up, deliver, or transport goods or to perform services, or if the publicity is untruthful. As noted above, no party claims that Respondent's handbilling had the effect of inducing any individual employed by any person to refuse, in the course of employment, to pick up, deliver, or transport any goods, or not to perform any services, and the record does not indicate otherwise.

With respect to the truthfulness requirement, it is clear from its express language that the proviso requires that the publicity advise the public of the nature of the primary dispute and the secondary employer's relationship to it. In one sentence, the instant handbills do just that: "[I]t looks like K-Mart is going to build its [sic] new Indianapolis store with non-union construction companies." (*Frash Earth Works). Thus, the nature of the primary dispute is amply described as the use of nonunion labor on the construction project, and the secondary employer's—K-Mart's—relationship to the primary dispute is that it is K-Mart's store that it is going to be built at least in part by Frash, the primary employer who employs the nonunion labor in dispute. In this regard, our analysis in this case is controlled by our recent decision in *Florida Gulf Coast Building Trades Council, AFL-CIO (The Edward J. DeBartolo Corporation)*, 252 NLRB 702 (1980). There, we found that a handbill which was remarkably similar in relevant part to the handbills in question here did not substantially depart from fact or intend to deceive, and thus was not beyond the scope of the publicity proviso.

In *DeBartolo*, to the extent relevant to the instant case, Wilson's was building a department store using a nonunion general contractor, High, with whom the union had a primary labor dispute involving High's payment of allegedly substandard wages to its employees. In furtherance of its pri-

mary labor dispute with High, the union distributed handbills urging consumers not to shop at the shopping mall where the Wilson's store was being constructed, "because of mall ownership's contribution to substandard wages." Of particular relevance to the instant case is the following sentence from the handbill in *DeBartolo*: "The Wilson's Department Store under construction on these premises is being built by contractors who pay substandard wages and fringe benefits." The primary employer in *DeBartolo*, High, was not named in that keynote sentence, or any place else in the handbill. Nevertheless, the Board found the failure of the union to identify High specifically by name as the primary employer did not render the handbill untruthful, and thus beyond the scope of the publicity proviso to Section 8(b)(4). Rather, the Board found that it had not been established that the handbill on its face, by omitting the name of High, substantially departed from fact or intended to deceive.³ Thus, the Board concluded that the handbill accurately stated that the union believed that Wilson's department store was being built by a contractor which paid substandard wages, and the Board dismissed the charging party's allegations of untruthfulness as being without merit.

In the instant case, the keynote sentence in the handbill alleged to be untruthful is, as seen, remarkably similar to its counterpart in *DeBartolo*, set out above. And here, unlike in *DeBartolo*, the primary employer, Frash, is expressly referred to by name in the handbill. Therefore, as in *DeBartolo*, *a fortiori* in the instant case, the handbill accurately states that Respondent believes the K-Mart department store is being built by a contractor which employs nonunion labor, and only requests that consumers not patronize K-Mart for that reason.⁴

³ *DeBartolo*, supra, 252 NLRB 702, fn. 2, citing *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Milk Drivers and Dairy Employees Local 537 (Jack M. Lohman, d/b/a Lohman Sales Company)*, 132 NLRB 901, 906 (1961).

⁴ We find the General Counsel's reliance on *Local 732, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Servair Maintenance, Inc.)*, 229 NLRB 392 (1977), to be misplaced. In *Servair*, there were no exceptions filed to the administrative law judge's conclusion that the respondent therein violated Sec. 8(b)(4)(i) and (ii)(B) of the Act by, *inter alia*, distributing untruthful written communications in furtherance of its primary labor dispute with *Servair*. No exceptions having been filed to the administrative law judge's unfair labor practice findings, they were affirmed by the Board.

We find no merit in the General Counsel's position, as set forth above, that the handbills in question were outside the scope of the second proviso to Section 8(b)(4) because they created the impression that K-Mart was directly responsible for engaging the services of Frash, the nonunion subcontractor. To the extent, if any, that the handbills gave such an impression—and we expressly do not reach such a finding—it still does not follow that, as the General Counsel asserts, the handbills therefore also leave the impression that Respondent's primary labor dispute was with K-Mart. Thus, *even if* K-Mart had directly contracted with Frash, K-Mart would still be a secondary employer, and Frash the primary employer, directly responsible for the hiring and use of nonunion labor on the construction project. Only if the handbills had stated or reasonably implied that K-Mart, rather than a contractor, was directly responsible for hiring the nonunion workers themselves could the General Counsel successfully claim that the handbills left the misimpression that Respondent's primary labor dispute was with K-Mart itself. But it is clear that the instant handbills did not make such a statement or create such an implication. To the contrary, the handbills clearly state the nature of the dispute—the use of nonunion labor on the construction project—and they clearly reveal that Frash, not K-Mart, was the employer directly responsible for the hiring of that nonunion labor.

Thus, we conclude that the complaint's allegation as to the untruthfulness of the instant handbills is not substantiated. Accordingly, we shall grant Respondent's motion and dismiss the complaint in its entirety.

ORDER

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

Moreover, in *Servair* the handbills were found to have misleadingly implied that the employees in question were the employees of National Airlines, a secondary employer. The handbills were also found to have contained several specific substantial untruths about the primary employer's alleged refusal to hire members of the respondent union. In the instant case, on the other hand, the handbills contain no implication that the nonunion construction employees in question are employees of K-Mart, and there is no contention that the instant handbills contain any misstatement of fact. Thus, we find *Servair* is inapposite.